UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BARING INDUSTRIES, INC.,

Plaintiff,

v. 19 cv 2829 (JGK)

3 BP PROPERTY OWNER LLC, et al.,

Defendants.

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New York, N.Y.
July 13, 2020
2:30 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

ROSEN LAW LLC
Attorneys for Plaintiff
BY: JARED MICHAEL ROSEN
GARY ROSEN

SILLS CUMMIS & GROSS PC
Attorneys for Defendants
BY: MITCHELL D. HADDAD
KATHERINE MARGUERITE LIEB

(Case called)

THE COURT: Good afternoon. This is Judge Koeltl. This is a teleconference.

Is the court reporter on the call?

THE COURT REPORTER: Yes, your Honor. How are you?

THE COURT: I'm fine. Good afternoon. Thank you.

Because we're keeping a transcript of this conference, no one else should be recording the conference.

Mr. Alderson, call the case, please.

(Case called)

THE DEPUTY CLERK: Could the parties state who they are, starting with plaintiff's counsel.

MR. JARED ROSEN: Jared Rosen and Gary Rosen for plaintiff bearing industries. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. HADDAD: Mitchell D. Haddad and Katherine Lieb for the Defendant BP Property Owner LLC and Westchester Fire Insurance Company.

Good afternoon, Judge.

THE COURT: Good afternoon. Hold on one second. Remember to keep your voices up and state who you are so the court reporter can get down the proper attributions.

This is a motion to dismiss. I'm familiar with the papers. I'll listen to argument briefly.

So, for the defendants, what would you like to tell

me?

MR. HADDAD: Mitchell Haddad speaking. This is a motion to dismiss the amended complaint's three claims against 3 BP Property Owner LLC, which is the owner of the building at 3 Bryant Park, and Westchester Fire Insurance Company, which is the surety that posted a bond to bond the plaintiff's lien.

The first cause of action seeks to foreclosure a mechanic's lien that's alleged against Dadong Catering and Westchester Fire but not 3 BP.

The third cause of action is for unjust enrichment. It's against Dadong and 3 BP but not Westchester Fire. The fourth cause of action is for quantum meruit against Dadong and 3 BP, again, not against Westchester Fire.

But all claims seek personal judgments against my clients, 3 BP Property Owner and Westchester Fire, although these claims are not alleged against both of them.

Baring's claims against 3 BP and Westchester Fire should be dismissed, your Honor, because they fail to plead any facts that state a plausible claim for relief on its face as required by *Twombly* and *Iqbal*. They should also be dismissed because they fail to state a cause of action as a matter of law.

Now, 3 BP Property Owner leased certain retail premises to Dadong Catering LLC. And up until when this motion was made, Dadong in been in full and complete possession of the

premises pursuant to a lease.

Dadong operated a restaurant and made certain leasehold improvements to build out its space, certain of which were permanent and would remain with the landlord when the lease was over.

But the lease doesn't specifically require Dadong to make any specific improvements. The landlord never required them to make any specific improvements. What the landlord did agree in the lease is to provide what's called a tenant improvement fund which would reimburse Dadong for some of the leasehold improvements that it chose to make to build out for a restaurant.

But the lease provides that Dadong would only be entitled to reimbursement if it produced paid bills and architect certificates and partial lien waivers for the leasehold improvements to my client, 3 BP Property.

And the lease specifically precludes Dadong from using any tenant improvements funds to purchase or install equipment, trade fixtures, and personal property -- all of which had to be removed at the end of the lease.

The lease does not mention Baring, the plaintiff, but specifically required Dadong to hire Baring and specifically authorized Baring to perform any services or provide materials to Dadong's leased premises.

Now, the plaintiff filed a mechanic's lien against the

premises, and it's attached as Exhibit 1 I believe to the opposition -- excuse me. To my reply affirmation.

It states on its face that Baring was employed by Dadong and it provided the work and materials to Dadong, and those work and materials had to do with project management, coordination, and installation of food service equipment -- ranges, hoods, walk-in refrigerators, your Honor.

They also attach a copy of an AIA standard contract, which was Exhibit 1 to the opposition affirmation of Mr. Jared Rosen. It's an AIA contract for furnitures, furnishings, and equipment, not for permanent improvements.

THE COURT: But could I just stop you.

How could I determine on the basis of a motion to dismiss whether any of the improvements for which reimbursement is being sought from the owner, which is a relatively small part, somewhere in excess of $300,000, compared to the total amount of the services and equipment that Baring provided?

So of the $300,000 that was being sought and for which a lien was imposed on the property, how could I determine just on the basis of the pleading that none of that was a permanent improvement which was required to be left on the premises and become part of the property as opposed to the personal property that had to be removed at the end of the lease?

MR. HADDAD: Well, Judge, you're hitting on the argument I believe that Baring is making having to do with the

consent issue.

And their argument here is that the lease provided the consent, which is an essential element, an owner's consent if you will, which is an essential element of the claim. I'm not asking you at this point to dismiss because it's not a permanent improvement. That will happen later on in the case, if the case proceeds.

For reasons that I won't get into, most significant of which is that there was an auction of all the property. People brought it to 100 some odd thousand dollars and then taking everything out. It's movable. So it will be an empty space, other than what's physically attached to the walls.

Getting to the issue here, Judge, is the complaint's failure to completely allege that my client, 3 BP Property Owner, as an owner of real property consented to the improvements that may have been performed by Baring to my client's tenant.

Now, clearly Westchester Fire Insurance Company is a bonding company. They had nothing to do with the property. They had nothing to do with this lien. They had nothing to do with the lease. All they are is a bonding company.

THE COURT: Yes, but they stand in the shoes of the owner of the property having put up the surety bond.

MR. HADDAD: Actually, Judge, with respect, all they did to guarantee the judgment that this Court may render on the

first cause of action which was only for the lien. They cannot be liable for unjust enrichment.

THE COURT: That's fine. You can put those aside.

MR. HADDAD: It is only a judgment. And the judgment is only limited by what the Lien Law allows.

THE COURT: Yes. But that means they don't get dismissed on Count One.

MR. HADDAD: Well, Judge, I think they do for this reason. You'll recall that the original complaint contained not a single allegation about the owner, 3 BP, consenting to any of the work Baring originally performed.

So your Honor granted them leave to replead. And the first amendment of amended complaint conclusory asserted that "Owner consented to various work" without saying what it did, how it did, or putting any meat on those bones so to speak. And the Court again permitted Baring to replead.

Now what the second complaint attempts to do is satisfy the huge hole in its case by alleging the elements of owner's consent in every conceivable way possible through a series of jumbled, conclusory, confusing, and contradictory allegations.

THE COURT: Hold on. Among other things, they say that the lease to Dadong hadn't been provided to them and they only got it through the state court litigation. So they couldn't have pleaded it earlier, and now they do.

MR. HADDAD: Those allegations in the present complaint, paragraphs 35, 46, and 49 -- those allegations were made without ever seeing the lease. Number two, there is no basis for those allegations. That's complete made-up fiction.

Number three, Judge, my client is under no obligation to give it to them, and they have never even asked me for a copy of the lease.

Getting to the lease, if you will, if you want to go there -- I wanted to walk through the allegations in the second amended complaint to show you that they're completely bereft of statutory language and case law language that is needed to show that my client, 3 BP, was an affirmative factor in procuring the improvement to be made, for having possession and control of the premises, assent to the improvement and the expectation that he or she will receive the benefit of it.

So the second part of that test, Dadong must have complete possession and control. It was a lease. It was a conveyance. They had exclusive possession and control until my client evicted them following the making of this motion.

With respect to procuring being an affirmative factor, paragraph 25 of the amended complaint says: "Owner was an affirmative factor in procuring the work." It doesn't say how. It doesn't say what it did.

Paragraph 26: "owner was in possession and control with Dadong's leased premises." That's contrary to the lease.

It provides that Dadong was in exclusive control.

Paragraph 27: "Owner consented to Baring's work." It doesn't say how. It doesn't say what it did.

Paragraph 32: "Owner consented to the improvements made by Baring in accordance with Lien Law Section 3." That's just parroting the statute, again, a conclusion.

Paragraph 28.

THE COURT: Okay. I am familiar with the papers.

MR. HADDAD: Let's talk about the lease base documents 23406789 we know that 3 BP Property Owner had no dealings with Baring. It didn't contract with Baring. It never paid for it. It never approved anything. It never received or stored any of the goods. Everything was between Dadong and Baring.

Now, there is nothing in the lease that required Dadong to hire Baring or perform the specific work. It's not enough, Judge, as we cite in our papers, for a lease to acknowledge or consent to general work to be done by tenant.

The lease must specifically require the tenant to perform the specific work that Baring here performed, or the landlord itself must be actively engaged with the tenant in the performance of work, such as in one case the landlord actually helped the tenant install electric work.

Now, the consent contemplated by the statute is not a consent given to the tenant but a consent given to the materialmen. There is nothing in the lease from which it

explicitly or implied any consent from the owner, 3 BP, to Baring to perform any work.

Baring has failed to identify any lease provision in which the landlord specifically required Dadong to do anything that Baring may have done. There is no lease provision in which 3 BP expressly consented to the specific work Baring allegedly performed.

There is one case that we've cited, Judge, where if they do work to install a boiler, then they're not liable for leave to install electricity.

If you go through paragraph 3.03, which is where they hang their hat on, all that basically provides, your Honor, is that there's something called tenant's initial work.

And in tenant's initial work, there is going to be a $1.8 million allowance. And for the tenants to recover the allowance as provided in Section 3.04, it's got to get paid invoices, a certificate signed by tenant's architect, and partial lien waivers.

There is nothing in this complaint, your Honor, that says that Baring provided any partial lien waivers. Actually if you look at their AIA contract, Dadong is required to pay Baring just upon presentation of their bill.

THE COURT: Excuse me, counsel.

How do I know that given the explicit provision in the lease, which provides for the owner to pay for those

improvements, the specific improvements for which relief is being sought in Count One are not within those improvements?

I don't understand why that's not the subject for discovery. You tell me that there are other dispositive issues that will dispose of this case subsequently. Okay. I guess that's on a motion for summary judgment.

But I still don't understand why there aren't sufficient allegations in the complaint with respect to the issue of owner consent to survive a motion to dismiss.

MR. HADDAD: Your Honor, the plaintiff cited a case in their brief. It's called *Rice v. Culver*. It's a Court of Appeals case. It's from 1902. They cite it there at the end of their reference to the *Ferrara* case.

Ferrara absolutely supports dismissal, but let me just tell you about *Rice*. In *Rice*, there was a landlord, an owner of a property, who entered into a lease with the tenant, and the tenant went and hired a third party to perform some work under the lease.

And the trial court held it was because of the fact that the tenant was required to perform work under the lease, that doesn't evidence the affirmative factor of consent as required by Lien Law 3. The appellate division reversed and reinstated the trial court's judgment.

And the state Court of Appeals reversed the appellate division, reinstated the trial court's judgment dismissing the

complaint, and it basically said that just because the tenant was empowered to make improvements to its leased premises, that per se does not constitute the consent requirement for the purposes of Lien Law 3.

THE COURT: And then the Court of Appeals distinguished *Rice* and *Ferrara* and said *Rice* was being read too broadly.

MR. HADDAD: I'm not aware of that case, your Honor.

THE COURT: *Ferrara*. It's the case you just cited. You read *Rice*, and then the Court of Appeals distinguished *Rice* and *Ferrara*.

MR. HADDAD: Yes. Because, your Honor, in *Ferrara*, the lease expressly required the electrical work that was plaintiff's former lien and required the landlord to retain close supervision over the work and authorized it to exercise some discretion and direction over the work by reviewing, commenting on, revising, and granting ultimate approval for the specific electrical work.

There's nothing here where that's alleged that 3 BP did any of this. I agree, your Honor. If the landlord, the owner, is involved with the work itself, a lien can be filed because that should constitute owner's consent. But there is nothing here that gives privity.

THE COURT: Okay. All right. Let me listen to the plaintiff.

MR. JARED ROSEN: Good afternoon, your Honor. This is Jared Rosen for the plaintiff.

THE COURT: Is that better?

MR. JARED ROSEN: Yes. This is Jared Rosen for the plaintiff.

The plaintiff's position is that your Honor is correct to determine in that the issues that counsel has been raising about the specific items of work that were provided, that that is something that is not to be determined in the instant motion to dismiss. It is more appropriate for a motion for summary judgment.

From the plaintiff's perspective, they should be provided with the opportunity to take discovery on everything that has been brought to the Court's attention thus far in the motion papers, including the lease, the sections of the lease that the plaintiff believes give the owners consent for the work to be provided by the plaintiff to the tenant, and also to the actual permanent improvements to the property and whether or not the improvements that were provided or that plaintiff performed were all permanent improvements or otherwise just improvements counsel is stating might affect the amount of the lien. But it's the plaintiff's position that they're all permanent improvements because everything was provided and attached to the premises themselves.

The second amended complaint was specific as far as

what the plaintiff had in its possession at the time, and that is that everything that the plaintiff had done -- they were hired by the tenant. They were hired by the tenant with the landlord's consent and knowledge.

It is correct that we did not have the lease until after the second amended complaint was filed at the end of September of 2019. That was because there were cases that as we've stated in our opposition papers -- for example, the landlord filed their -- they actually commenced their action against the guarantors on the lease only on October 11, 2019.

That was about two weeks after the second amended complaint was filed, and it was over a month after our September 4 premotion conference where we discussed these issues before your Honor and requested permission to file a second amended complaint.

But the paragraphs that are obtained that counsel was citing before -- I'm not going to specifically cite each paragraph because Mr. Haddad did earlier. But the paragraphs, even just between paragraphs 24 to 39 of the second amended complaint, they do sufficiently allege that the owner consented; that the consent was provided in the lease; that it can be inferred. But it actually is provided in the lease between the landlord and the tenant for work to be performed.

It's the plaintiff's position that the three causes of action that Mr. Haddad is moving to dismiss herein -- that they

should survive this and that the motion should be denied in its entirety because the plaintiffs did allege as much as is required under the standard for pleading these three causes of action.

And I want to note also on the second and third causes of action for unjust enrichment and quantum meruit, the defendants' reply cites that the plaintiffs -- that we failed to address those two causes of action.

And because of that, they state that the two unjust enrichment and quantum meruit causes of action should be deemed to have been abandoned. But I believe that for some reason, the pages 12 to 15 of my declaration in -- excuse me -- the memorandum in response to the motion to dismiss actually goes directly towards opposing those portions of the motion to dismiss on the unjust enrichment and quantum meruit claims.

So they're certainly not abandoned. And it's respectfully submitted that the two causes of action for unjust enrichment and quantum meruit should stand as well for the reasons contained in the papers that we submitted in opposition which we do cite case law towards.

THE COURT: Why aren't those quasi-contract claims barred by the existence of the contract between Dadong and Baring? Baring agreed to perform the work in accordance with its contract with Dadong. So there is a contract directly on point that covers the services.

The normal rule is if there is a contract directly on point which covers the work, then you can't plead quasi contract, either unjust enrichment or quantum meruit.

Why doesn't that principle bar the quasi-contract claims?

MR. JARED ROSEN: Our argument is that the contract between plaintiff and Defendant Dadong -- it did not specifically in the AIA contract contain an agreement between, as your Honor can tell by both of us, both sides claiming, that the contract itself was not between the plaintiff and the defendant/owner/landlord.

THE COURT: That's right. It was with a third party, a third party as to the owner. It was between Dadong and Baring.

MR. JARED ROSEN: Correct.

THE COURT: But it was a contract to provide work and to pay for the work, which you now seek by a quasi-contract claim, unjust enrichment, or quantum meruit. Even though the contract was with a third party, the cases appear to be clear that you can't have a quasi-contract claim when there is a contract directly on point for the same subject matter.

The damages that you seek are exactly the same as they would be for a claim to enforce the contract. So because there's a contract, you can't sue in quasi contract.

Now, there are exceptions. If the contract is

allegedly defective or if the existence of the contract is somehow disputed, but none of that's true.

There's a contract directly on point that provides the services to be provided and payment to be made. The party providing the services can't then sue in quasi contract simply because the contract was entered into which third putter.

You haven't given me any cases, so as far as I can tell, that say that basic principle is just not true.

MR. JARED ROSEN: The argument is the landlord, inasmuch as they're claiming that portions of the contract would not be applicable for various reasons they have given, including but not limited to certain parts of it not being permanent improvement --

THE COURT: No. No. You're talking about the lease. The issue is not with respect to the quasi-contract claims, the lease. The issue is obviously there was a contract between Baring and Dadong in which Baring provided the services and improvements in return for receiving payment from Dadong. So there's a contract directly on point that Baring has or had with Dadong.

It then can't say, well, I'm going to forget about that contract and sue for the value of the services that I provided. It had a contract. It can sue on the contract. It probably is suing on the contract for the services that it provided to Dadong.

It can't then turn around and say, well, I'm going to sue as if there were no contract. There is and was a contract for exactly the same services for which it now seeks reimbursement under quasi contract.

MR. JARED ROSEN: Yes. That's correct.

THE COURT: Why aren't the claims for quasi contract therefore barred?

MR. JARED ROSEN: It's our position, notwithstanding the law that counsel cited and that your Honor just provided, that the landlord benefited from the services that were provided.

And in the event that those do not overlap with what's in the AIA contract, that those portions of work that might have been provided that were not specifically contained in the AIA contract, that in that case, plaintiff should have the right to recover against the landlord under the quasi contract causes of action.

Inasmuch as the plaintiff provided all of the work that was contemplated in the AIA contract and they're pursuing that against Dadong which was secured by the lien which has been bonded and discharged, then your Honor is correct.

THE COURT: Okay.

MR. JARED ROSEN: I just wanted to get back because Mr. Haddad mentioned that Dadong was the party that was in possession of the actual premises from the time that their

lease took place.

But we attached an exhibit, I believe just one of several documents that exist, which, for example, I believe this is Exhibit 8 on the opposition, which was a form submitted to the New York City Department of Buildings. This was actually submitted after the lease was already signed, several months after the lease was already executed.

It specifically says the owner of the property, 3 BP Property Owner needed to put down the name of the property owner and have signatures that were filed with the city.

So the plaintiff's position is that the landlord was aware of the work that the plaintiff was doing for the tenant and that they were specifically doing the work for the tenant because the landlord entered into the lease with the tenant improvement allowance so that the tenant can actually build out the premises to their specifications so they can actually perform on the lease and have an operational restaurant and I believe operate that restaurants for many years.

That's the only reason why the plaintiffs were even in position to provide all the work that they did. So for all those reasons, we respectfully request that the motion be denied so that we can move forward and exchange on both sides discovery demands and ultimately take depositions so that we can narrow the issues further and hopefully come to an ultimate resolution of the case.

THE COURT: Okay. Thank you.

MR. HADDAD: Your Honor, may I just reply?

THE COURT: Briefly, yes.

MR. HADDAD: Mitchell Haddad here.

The crux of the plaintiff's argument is that the landlord was aware of the work by tenant and that Baring did the work for tenant so that tenant could perform under the lease.

That argument has squarely been rejected by three courts, all of which are cited in my papers. In the *Interior Buildings* case, which is cited on page 4 of my reply, the lease provided for a tenant improvement allowance for the tenant to perform improvements. The tenant hired a third party. Held that was not the consent required for the purposes of Lien Law 3.

The *Paul Mock* case where the landlord consented specifically to a tenant's request to perform improvements. And the court, the First Department, held in 1982 that the owner's consent was required by the lease and it was sought by the tenant to avoid a forfeiture of the lease. That does not constitute the required consent.

In the *Creech* case decided by the Third Department in 2012, C-r-e-e-c-h, had to do with an owner had to sign certain governmental approvals for contract vendees to perform certain work. The third party performed the work for the contract

vendees.

The Third Department held that that consent in signing the approvals, which they refer to as Exhibit 8, does not constitute the consent for the purposes of the Lien Law. I also note in Exhibit 8 the name of the architect is not the plaintiff's architect. They didn't have an architect.

Two other points: One is discovery, your Honor. Discovery is not to be used as a fishing expedition that creates a cause of action where none exists. They've had three opportunities to plead the consent requirement. And the real issue here, Judge, it's a how. It's a who, what, when, and how.

And this complaint is completely devoid of showing what the landlord did, other than by signing the lease that generally permits the tenant to perform certain build-outs and it would give him a tenant improvement credit -- how that constitutes an express consent to a third party Baring for Baring to perform this work. That is the crux of the case, Judge, and there is nothing in this complaint that satisfies that.

I thank you very, very much for hearing us. Thank you.

THE COURT: For sure. No problem. I am ready to decide.

As I said, I'm familiar with the papers. I've

listened to the arguments. And I'm prepared to decide the motion.

The remaining defendants in this case, 3 BP Property Owner LLC, otherwise known as "3 BP Property" and Westchester Fire Insurance Company, otherwise known as "Westchester Fire", move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the plaintiff's first claim in the second amended complaint against Westchester Fire to foreclose on a mechanic's lien and for judgment on a bond; the third claim in the second amended complaint for unjust enrichment; and the fourth claim in the second amended complaint for quantum meruit.

The standard for deciding a motion to dismiss pursuant to Rule 12(b)(6) is well-established. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences must be drawn in the plaintiff's favor. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

The following allegations taken from the second amended complaint and documents incorporated by reference in the second amended complaint are accepted as true for purposes of this motion to dismiss.

3 BP Property is the owner of premises at 3 Bryant Park, also known as 1095 Avenue of the Americas, and 126-128 W. 42nd Street, New York, New York, otherwise known as the "premises." Second amended complaint paragraphs 12-13.

3 BP Property was the landlord to Dadong Catering LLC, which occupied the premises as the tenant. Dadong has not appeared in this action and had a default entered against it on May 30, 2019. Dadong filed for Chapter 11 bankruptcy on November 13, 2019. ECF No. 83.

3 BP Property and Dadong entered into a lease agreement for Dadong to lease the premises, and as part of the lease agreement Dadong was allegedly required to undertake construction, renovations, and improvements to the premises. Second amended complaint, paragraphs 23 to 25.

3 BP Property allegedly knew and consented to Dadong's engaging the services of contractors, subcontractors, suppliers, and other materialmen to perform work at the premises. Id. at paragraphs 27 to 29.

At all relevant times, 3 BP Property allegedly had possession and control of the premises and assented to improvements to the premises allegedly because 3 BP Property

expected that any improvements would accrue to the benefit, either directly or indirectly, of 3 BP Property as the owner of the premises. Id. at paragraph 26.

The lease agreement between the landlord, 3 BP Property, and the tenant, Dadong, the specifics of which only came to light in this litigation after the plaintiff filed the second amended complaint as a result of discovery in a separate state court action brought by 3 BP Property against Dadong's guarantors, provides that the "Landlord shall pay to tenant an allowance up to the amount of $1,825,000.00, which amount shall be paid to tenant for the cost and expense incurred by tenant for the actual construction performed in connection with tenant's initial alterations in the premises . . . and for so called 'soft costs', including, without limitation, architectural and engineering fees in connection with tenant's initial work performed within two years . . . provided, however, that no portion of the allowance may be applied towards the cost of portable equipment, furniture, or other items of personal property of tenant." Rosen Decl. Ex. 2, § 3.03.

The lease agreement defines "Tenant's Property" as "all tenant's business and trade fixtures, equipment, movable partitions, furniture, merchandise and other personal property within the premises . . ." Id. § 14, and provides that "at the termination of this lease or tenant's right of possession . . .

tenant shall remove . . . tenant's property from the premises . . ." Id. § 24.

The lease provides that "all improvements in and to the premises made by tenant other than tenant's property or except as may be otherwise expressly set forth herein, including, any alterations (collectively, leasehold improvements," shall remain upon the premises at the end of the term without compensation to tenant." Id. § 8.01

Dadong allegedly contracted with the plaintiff, Baring Industries, Inc., on May 15, 2017 to make a number of improvements to the premises, including but not limited to, the installation of ranges, hoods, and walk-in refrigerators on the premises. Id. at paragraphs 38(a)-(w), 63.

The total value of the contract for work, labor, services, and equipment that the plaintiff performed and installed on the premises was $2,147,039.41. Baring alleges that it fully performed under its agreement with Dadong by providing labor and furnishing materials on the premises from approximately May 15, 2017 to July 18, 2018. Id. at paragraphs 57, 69.

The plaintiff alleges that out of the original $2,147,039.41 owed to the plaintiff, the plaintiff is now owed $320,356.94 for the unpaid portion of the contract representing labor, services, and materials expended by the plaintiff. Id. at paragraphs 42-43.

On February 15, 2019, the plaintiff filed a notice under the Mechanic's Lien Law in the Office of the New York County Clerk in the amount of $320,356.94 against the premises to secure the plaintiff's entitlement for services performed by the plaintiff on the premises. Id. at paragraph 18.

The Lien Law notice specified that the work and labor performed was "for the installation of foodservice equipment, including, but not limited to, ranges, hoods, walk-in refrigeration, project management, and coordination, etc." Haddad Affirm Ex. A.

On May 22, 2019, 3 BP Property, as principal, and Westchester Fire, as surety, bound themselves, jointly and severally, under a surety bond in the penal sum of $352,392.63 in order to discharge the mechanic's lien held by the plaintiff against the premises. Id. at paragraph 44.

As relevant to this motion, the plaintiff has brought one claim against Westchester Fire to foreclose the mechanic's lien and for judgment on the bond under the New York Lien Law; one claim for unjust enrichment against Westchester Fire and 3 BP Property; and one claim for quantum meruit against Westchester Fire and 3 BP property.

In this case, the surety, Westchester Fire, substituted the bond for the lien. And thus, whether Westchester Fire is liable on the bond turns on the question whether the plaintiff has alleged sufficiently that it could

foreclose on the mechanic's lien in which 3 BP Property is named. See Morse/Diesel, Inc. v. Trinity Indus., Inc., 67 F.3d 435, 445 (2d Cir. 1995) "Liability as a surety depends on the liability of its principal . . . ."

Under the New York Lien Law, "a contractor, subcontractor, laborer, or materialmen . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor, or subcontractor, . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter." N.Y. Lien Law § 3.

"To enforce a lien under Lien Law § 3, a contractor performing work for a tenant need not have any direct relationship with the property owner." Ferrara v. Peaches Café LLC, 115 N.E.3d 621, 624 (N.Y. 2018).

Rather "to fall within that provision, the owner must either be an affirmative factor in procuring the improvement to be made or, having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it." Id. quoting Rice v. Culver, 64 N.E. 761, 762-63 (N.Y. 1902).

In cases "in which the tenant covenanted by the lease to erect buildings or make improvements . . . the estate of the landlord was properly held liable, because not only did he require the improvement to be made, but the improvement inured to his benefit, either because it reverted to him at the expiration of the demised term, or because his rent proceeded from its use." Rice, 64 N.E. at 763 (internal citations omitted).

The New York Lien Law requires the landlord to make some "affirmative act" in order for courts to find that the landlord consented to the improvements, but the 'affirmative act' can include lease terms requiring specific improvements to the property." Ferrara, 115 N.E.3d at 626.

"When a lease does not require improvement, the owner's overall course of conduct and the nature of the relationship between the owner and the lienor may demonstrate consent for purposes of Lien Law § 3." Id. Consistent with the purposes of the law, the law "is to be construed liberally to secure the beneficial interests and purposes thereof." Id. at 624.

The plaintiff has alleged sufficiently that 3 BP Property was an "affirmative factor" in procuring the permanent improvements, whatever they were, that the plaintiff made to the premises by pointing to the terms of the lease between Dadong and 3 BP Property.

It is reasonably clear from the terms of the lease between 3 BP Property and Dadong, particularly Section 3.03 of the lease, that 3 BP Property expressly contemplated that Dadong would make improvements to the premises.

Section 3.03 went beyond mere "authorization" that Dadong be allowed to make repairs and nonspecific alterations. See M&B Plumbing & Heating Co., Inc. v. Cammarota, 477 N.Y.S.2d 901, 902 (App. Div. 1984).

Section 3.03 stated that the "Landlord shall pay to tenant an allowance up to the amount of $1,825,000.00, which amount shall be paid to tenant for the cost and expense incurred by tenant for the actual construction performed in connection with tenant's initial alterations in the premises."

The use of the word "shall" and the setting aside of a fixed sum of money, $1,825,000.00, for the "actual construction performed" indicate that 3 BP Property was not merely authorizing but actively consenting to improvements to the premises.

Moreover, Section 3.03's use of the phrase "Initial Work" and the fact that only improvements made within two years of the lease agreement suggests that 3 BP Property contemplated a set of specific permanent improvements that Dadong would make when Dadong first became a leaseholder within a fixed time period in order to make the premises initially operational for Dadong. See id. finding a landlord had consented within the

meaning of the Lien Law where the vendee certified that it would make improvements to the premises within one year.

It seems reasonably clear that the parties "were well aware of the intended use of the property as a" commercial kitchen, and "it can be inferred that improvements furthering that purpose were within the parties' contemplation . . . ." Id. at 903.

Further, by carving out the "Tenant's Property" from the coverage of the allowance to be paid to Dadong to undertake improvements, which property other parts of the lease required Dadong to remove at the end of the lease, 3 BP Property was effectively acknowledging that it would have a reversionary interest in the permanent improvements undertaken by Dadong and that such improvements would inure to the benefit of 3 BP Property. See id. finding consent where the lease terms did more than authorize repairs and nonspecific alterations that would "add nothing of value to the vendor's contingent reversionary interest."

Section 8.01 of the lease, which stated that "all improvements in and to the premises made by tenant, other than tenant's property or except as may be otherwise expressly set forth herein, including any alterations collectively, "Leasehold Improvements," shall remain upon the Premises at the end of the term without compensation to tenant."

Expressly contemplated that certain improvements made

by Dadong would inure to the benefit of 3 BP Property was specifically provided for in Section 8.01 of the lease.

Thus, contrary to the defendants' contention, the fact that there is a distinction drawn throughout the lease between leasehold improvements and trade fixtures implies that 3 BP Property did give consent by the terms of the lease that Dadong undertake certain improvements that would then remain on the premises following the termination of the lease and that would be excluded from the property that Dadong had a contractual obligation to remove at the end of the lease.

The lease establishes that 3 BP Property consented to some kinds of permanent improvements to the premises based on the fact that the lease contemplated that Dadong would undertake initial work that would eventually inure to the benefit of 3 BP Property following termination of the lease.

What is unclear from the second amended complaint and the papers submitted on this motion to dismiss is what is the precise nature of the unpaid labor, services, and equipment costs that are the subject of the mechanic's lien and whether all the improvements made that are subject to the unpaid portion of the contract between the plaintiff and Dadong are rightly classified as "Leasehold Improvements" under the term of the lease.

Whether the unpaid money allegedly owed to the plaintiff was for work done for permanent improvements, within

the meaning of the Lien Law and the lease agreement or, instead, for property that would be removable by Dadong at the end of the lease, could not be decided on the current papers. See Murname Bldg. Contractors, LLC v. Cameron Hill Constr., LLC, 73 N.Y.S.3d 848, 851 (App. Div. 2018) finding that documentary evidence submitted by an owner was insufficient to establish as a matter of law on a motion to dismiss that the defendant did not give consent to the improvements that gave rise to the mechanic's lien.

The defendants argue that the description of the labor and services in the notice of the lien itself makes clear that the subject of the lien did not come within the ambit of leasehold improvements that 3 BP Property consented to but whether "the installation of foodservice equipment, including, but not limited to ranges, hoods, walk-in refrigeration, project management and coordination, etc." fell within the scope of what 3 BP Property's implicitly consented to because those installations were "permanent improvements" that would inure to the benefit of 3 BP Property at the end of the lease term cannot be determined based on the current papers and there are factual issues in dispute that must await further development in the case.

Similarly, the auction of Dadong's assets as part of Dadong's bankruptcy proceedings is not necessarily conclusive because it is not clear from the papers whether the items to be

auctioned bear any relation to the labor, services, and equipment that is the subject of the mechanic's lien.

Because there are facts in dispute that cannot be determined on this motion to dismiss, namely, whether the unpaid portion of the labor, services, and equipment that is the subject of the lien concerns tenant's property or leasehold improvements, it is impossible to conclude that the allegations in the complaint, taken as true, fail to state a cause of action against the defendants. The motion to dismiss the first cause of action is denied.

Under New York Law, quantum meruit and unjust enrichment can be analyzed together as one quasi-contract claim. Mergers & Acquisition Servs., Inc. v. Eli Glob., LLC, No. 15-cv-3723, 2017 WL 1157132, at *14 (S.D.N.Y. Mar. 27, 2017).

To allege a claim for unjust enrichment, a plaintiff must allege that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Id. (internal quotation marks omitted).

"A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all but, rather, a legal obligation imposed in order to prevent a party's unjust enrichment." Clark-Fitzpatrick, Inc. v. Long Island R. Co., 516 N.E.2d 190, 193 (N.Y. 1987).

Thus, "it is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." Clark-Fitzpatrick, 516 N.E.2d at 193.

This is the case even when the plaintiff seeks to hold a non-signatory to the contract liable in quasi-contract. See Air Atlanta Aero Engineering Ltd. v. SP Aircraft Owner I, LLC, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009)

"A quasi-contractual claim against a third party must be dismissed when an undisputedly valid and enforceable written contract governs the same subject matter." Mueller v. Michael Janssen Gallery Pte. Ltd., 225 F. Supp. 3d 201, 207 (S.D.N.Y. 2016) (collecting cases).

In this case, the plaintiff alleges that 3 BP Property and its surety, Westchester Fire, have been enriched due to the work, labor, materials, and services provided to the premises at the plaintiff's expense.

The plaintiff argues that neither of the two defendants were parties to the contract entered into between Dadong and the plaintiff but that the terms of the lease between Dadong and the plaintiff, specifically Section 8.01, make it clear that certain improvements would become part of the landlord's property at the end of the lease.

Therefore, the plaintiff argues that improvements for which the plaintiff remains unpaid have unjustly enriched the defendants and that the plaintiff is owed payment by the defendants in quasi-contract.

The defendants argue principally that the existence of a written contract between Dadong and the plaintiff precludes recovery in quasi-contract against the defendants. The defendants are correct.

The parties do not dispute that a valid contract was entered into between the plaintiff and Dadong for work on the premises and that the terms of that contract cover the subject matter of the claim for unjust enrichment and quantum meruit against the defendants.

The existence of that valid written contract governing the subject matter of the quasi-contract claims bars the plaintiff's recovery in quasi-contract, even against the non-signatory defendants 3 BP Property and its surety, Westchester Fire.

The plaintiff may not overcome this result by arguing that it may plead a contract claim against Dadong and a quasi-contract claim against the non-signatory defendants in the alternative. See LaRoss Partners, LLC v. Contact 911 Inc., 874 F. Supp. 2d 147, 165-66 (E.D.N.Y. 2012).

Nor has the plaintiff provided any authority to support recovery in quasi-contract against a non-signatory

simply because the signatory has defaulted or is in bankruptcy.

The motion to dismiss the quasi-contract claims is therefore granted.

The Court has considered all of the arguments of the parties. To the extent not discussed, the arguments are either moot of without merit. The motion to dismiss the claim to foreclose the mechanic's lien, Count One, is denied. The motion to dismiss the quasi-contract claims is granted. The clerk is directed to close all pending motions. So ordered.

All right. So that disposes of the motion to dismiss. The next phase, of course, as the parties have said, is disclosure and discovery. The parties should give me a Rule 26(f) report by July 24. If the report is otherwise reasonable, I'll simply endorse it as the scheduling order.

You can get my regular scheduling order from Mr. Fletcher, if you don't otherwise have it. The Rule 26(f) should include answers to the blank dates in my regular scheduling order.

Would the parties agree to try this case before the magistrate judge?

You don't have to answer now. You can just let me know after you've had your Rule 26(f). There's a line on my scheduling order which says you should get back to me by a date certain with respect to whether you think that the assistance of the magistrate judge for purposes of settlement would be

useful and whether you agree to trial before the magistrate judge. So you can just give me a date that you want to get back to me on those issues.

Is there anything else that I can do for you today?

MR. JARED ROSEN: No. Thank you, your Honor. Thank you very much.

MR. GARY ROSEN: Thank you, your Honor. Gary Rosen.

THE COURT: Great.

MR. HADDAD: Your Honor, Mitchell Haddad. Can I get a copy of the transcript? Can we order it?

THE COURT: Yes. You can get a transcript. I'm sure the court reporter will be delighted to provide you with a copy of the transcript. I'll sign off, and the court reporter can give you the necessary details about how to order the transcript directly from the court reporter. Thank you, all.

(Adjourned)